

HON. JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re VALVE ANTITRUST LITIGATION

Lead Case No. 2:21-cv-00563-JCC

**AGREEMENT REGARDING
DISCOVERY OF ELECTRONICALLY
STORED INFORMATION AND
[PROPOSED] ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney's zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

1 **B. ESI Disclosures**

2 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each
 3 party shall disclose:

4 1. Custodians. The 10 custodians from Defendant, and 5 custodians from each of
 5 Wolfire and Dark Catt, most likely to have discoverable ESI in their possession, custody, or
 6 control. The custodians shall be identified by name, title, connection to the instant litigation, and
 7 the type of the information under the custodian's control.

8 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g., shared
 9 drives, servers, databases), if any, likely to contain discoverable ESI.

10 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain
 11 discoverable ESI (e.g., social media sites, third-party email providers, mobile device providers,
 12 cloud storage, instant message, and chat service providers), including but not limited to Slack, Mi-
 13 crosoft Teams, WeChat, Signal, WhatsApp, Telegram and, for each such source, the extent to
 14 which a party is (or is not) able to preserve information stored in the third-party data source. A
 15 party that issues a third-party subpoena shall include a copy of this Order and the Protective Order
 16 with the subpoena and state that the parties to the litigation have requested that third parties pro-
 17 duce documents in accordance with the specifications set forth herein. The issuing party shall
 18 timely notify other parties when it receives third-party productions, and shall provide copies of
 19 such productions in the format in which they were received from the third party within 5 business
 20 days.

21 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI
 22 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the
 23 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).
 24 Section (D)(3) below sets forth data sources and ESI which are not required to be preserved by the
 25 parties. Those data sources and ESI do not need to be included on this list.

26 5. Foreign data privacy laws. Nothing in this Order is intended to prevent either party
 27 from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European
 28 Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet

1 and confer before including custodians or data sources subject to such laws in any ESI or other
 2 discovery request.

3 **C. ESI Discovery Procedures**

4 1. On-site inspection of electronic media. Such an inspection shall not be required
 5 absent a demonstration by the requesting party of specific need and good cause or by agreement of
 6 the parties.

7 2. Custodians. After the parties disclose proposed custodians under Section B.1, the
 8 parties shall engage in a good faith process to negotiate over the list of custodians to be used by
 9 each party. These negotiations will result in lists of custodians ranging up to 20 for Valve and 10
 10 from each of Wolfire and Dark Catt. Nothing in this agreement shall preclude any party from
 11 seeking to add additional custodians, beyond the limits provided for in this Section C.2, should
 12 good cause arise during discovery.

13 3. Search methodology. The parties shall timely confer to attempt to reach agreement
 14 on appropriate search terms and queries, file type and date restrictions, data sources (including
 15 custodians), validation, and other appropriate computer- or technology-aided methodologies,
 16 before any such effort is undertaken. The parties shall continue to cooperate in revising the
 17 appropriateness of the search methodology.

18 a. Prior to running searches:

19 i. The producing party shall disclose the data sources (including
 20 custodians), search terms and queries, any file type and date restrictions, and any other
 21 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
 22 information. The producing party may provide unique hit counts for each search query, and
 23 aggregated across all queries.

24 ii. The producing party's disclosure shall represent a good faith effort
 25 to reach a reasonably fulsome set of materials consistent with the producing party's responses and
 26 objections to the requesting party's requests for document production. After that disclosure, the
 27 parties shall engage in a meet and confer process until the parties reach agreement on the proposed
 28

search protocol, including possible limits on the number of search terms, or impasse such that court intervention is required.

12 b. After production: The Parties agree to meet and confer at an appropriate
13 time regarding the validation procedures for when a producing party reasonably believes that it
14 has produced or identified for production substantially all responsive, non-privileged
15 documents. Nothing in this order shall inhibit a party from seeking additional documents should
16 good cause arise during discovery.

17 c. Upon reasonable request, a party shall disclose information relating to
18 network design, the types of databases, database dictionaries, the access control list and security
19 access logs and rights of individuals to access the system and specific files and applications, the
20 ESI document retention policy, organizational chart for information systems personnel, or the
21 backup and systems recovery routines, including, but not limited to, tape rotation and
22 destruction/overwrite policy.

23 | 4. Format.

24 a. Unless otherwise agreed to by the parties, files that are not easily converted
25 to image format, such as spreadsheet, database, and drawing files, will be produced in native
26 format. Any document produced in native format shall be produced with a Bates-numbered TIFF
27 image slip-sheet stating the document has been produced in native format, and noting the
28 document's confidentiality designation. The accompanying text files must be created with

1 extracted text or, if not available, with OCR of the native document. The text file must not be the
 2 OCRed version of the TIFF image slip-sheet. The parties hereby reserve their rights to seek other
 3 particular electronic documents in their native format for good cause shown.

4 b. The parties will meet and confer to discuss the format of production for any
 5 instant messages or chat messages.

6 c. Each document image or native file produced shall be named with a unique
 7 number (Bates Number). File names should not be more than twenty characters long or contain
 8 spaces.

9 d. If a document is more than one page, the unitization of the document and
 10 any attachments and/or affixed notes shall be maintained as they existed in the original document.

11 e. Except as otherwise set forth in this Order, the parties shall produce their
 12 information in the following format: black-and-white, single-page Group IV TIFF images of at
 13 least 300 dpi resolution and associated multi-page text files and an extracted text path in the DAT
 14 file, along with Concordance delimited load files or other software load files containing all
 15 information required by the litigation support system used by the receiving party. Original
 16 document orientation should be maintained to the extent reasonably practicable and
 17 technologically possible for a producing party's vendor (i.e., portrait to portrait and landscape to
 18 landscape). The imaged data shall retain all attributes of the native or hard-copy file, such as
 19 document breaks, to the extent reasonably practicable. Hidden content, tracked changes or edits,
 20 comments, notes, and other similar information within the native file shall also be imaged so that
 21 such content is viewable on the produced image file. Particular documents may be produced or
 22 requested to be produced as TIFF images of more than 300 dpi for legibility reasons. Upon
 23 reasonable request by the receiving party, the producing party shall produce in color as soon as is
 24 reasonably possible any charts, graphs, or document where color is necessary to understand the
 25 document.

26 f. The full text of each electronic document shall be extracted ("Extracted
 27 Text") and produced in a single document level text file, not one text file per page. The Extracted
 28 Text shall be provided in searchable ASCII text format (or Unicode text format if the text is in a

1 foreign language) and shall be named with a unique Bates Number (e.g., the unique Bates Number
 2 of the first page of the corresponding production version of the document followed by its file
 3 extension).

4 4. Email Threading. The parties may use analytics technology to identify email
 5 threads and need only produce the unique most inclusive copy and related family members and
 6 may exclude lesser inclusive copies. Upon reasonable request, the producing party will produce a
 7 less inclusive copy.

8 5. Password-Protected, Encrypted, or Proprietary-Software Files. With respect to any
 9 ESI items that are password-protected or encrypted within the scope of review, the producing
 10 party will take reasonable steps based on industry standards to ensure that the documents can be
 11 reviewed and produced if appropriate. In the event that encrypted or password-protected
 12 documents, which are reasonably likely to be responsive to a document request, remain encrypted
 13 or password-protected for a particular custodian after such reasonable efforts have been made, the
 14 producing party shall provide prompt written notice to the requesting party. ESI that cannot be
 15 reviewed because proprietary software is necessary to view the ESI will be disclosed to a
 16 requesting party, and the parties shall meet and confer regarding the next steps, if any, with respect
 17 to such ESI.

18 5. De-duplication. The parties may de-duplicate their ESI production across custodial
 19 and non-custodial data sources, after disclosure to the requesting party, only at the document
 20 family level so that attachments are not de-duplicated against identical stand-alone versions of
 21 such documents and vice versa. Attachments to e-mails or other documents shall not be
 22 disassociated from the parent e-mail or document even if they are exact duplicates of another
 23 document production. Each family member shall be hashed separately for purposes of populating
 24 the MD5/SHA-1 field.

25 a. To accommodate rolling productions, the producing party will provide the
 26 receiving party with an overlay file for each rolling production that includes the metadata field
 27 “Dedupe Custodians” and which will be updated with the duplicate custodians’ names.

1 6. Metadata fields. The following metadata fields set forth in Table 1 should be
 2 provided if they exist:

Field Name	Description
BegBates	The unique document number associated with the first page of a document
EndBates	The unique document number associated with the last page of a document
ParentBates	The unique beginning document number of the parent document
BegAttach	Bates number of first family member (parent)
EndAttach	Bates number of last family member
AttachBates	Bates number listing of all attachments in the family separated by a comma
PageCount	Page count for a document.
Custodian	The custodian of a document (if applicable).
From	Full email address of Sender
To	Full email address of Recipient(s) separated by semicolon
CC	Full email address of Carbon copy recipient(s) separated by semi colon
BCC	Full email address of Blind carbon copy recipient(s) separated by semi colon
Subject	Email subject.
Importance	Importance assigned by the sender of the email
MessageHeader	Displayed Header of an email
MessageID	Internal message ID of email
References (aka ReferenceChain)	Microsoft field containing the Message IDs of related emails.
SentDateTime	The date and time a document was sent (UTC).
ReceivedDateTime	The date and time a document was received (UTC).
MeetingStartDateTime	Meeting start date/time in UTC
MeetingEndDateTime	Meeting end date/time in UTC
Folder	Original File Path
Author	The display name of the author of a document
LastAuthor	Name of person who last edited and saved the file
FileName	The file name of a document.
Ext	The file extension of a document.
FileSize	The file size of a document (including embedded attachments).
DocTitle	Email Subject or Efile Title
CreatedDateTime	The date and time a document was created (UTC).
LastModifiedDateTime	The date and time the document was last modified (UTC).
Hash	The MD5 Hash value for the email including attachments.
NativeLinkPath	The full path to a native copy of a document (if applicable).
TextLinkPath	The full path to the text file of the document.
FileDescription	The type of document the file was identified as
DedupeCustodians	Listing of all custodians with duplicate file - based on specific dedupe set

Confidentiality Designation	The protective order designation (if any) assigned to the document
Redacted	To identify documents being produced with redactions

a. To the extent reasonably practicable, ESI items shall be processed using UTC time.

b. To the extent reasonably practicable, ESI items shall be processed so as to preserve the date/time shown in the document as it was last saved, not the date of collection or processing.

7. Hard-Copy Documents. In scanning paper documents, distinct documents should not be merged into a single record, and single documents should not be split into multiple records (*i.e.*, paper documents should be logically unitized). The parties will make their best efforts to have their vendors unitize documents correctly and will commit to addressing situations where there are improperly unitized documents. Parent-child relationships that have been maintained in the ordinary course of business should be preserved to the extent reasonably practicable. For example, if a party is producing a hard copy printout of an email with its attachments, the attachments should be processed in order behind the e-mail to the extent reasonably practicable. The child document(s) should be consecutively produced immediately after the parent document. The production of hard-copy documents will include a cross-reference file that indicates document breaks and sets forth the custodian or custodian/location associated with each produced document. Hard-copy documents will be scanned using Optical Character Recognition technology and searchable ASCII text files will be produced (or Unicode text format if the text is in a foreign language), unless the producing party can show that the cost would outweigh the usefulness of scanning (for example, when the condition of the paper is not conducive to scanning and will not result in accurate or reasonably useable/searchable ESI). Each file will be named with a unique Bates Number (e.g., the unique Bates Number of the first page of the corresponding production version of the document followed by its file extension).

D. Preservation of ESI

The parties acknowledge that they have a common law obligation, as expressed in Fed. R. Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in the

1 party's possession, custody, or control. With respect to preservation of ESI, the parties agree as
 2 follows:

3 1. Absent a showing of good cause by the requesting party, the parties shall not be
 4 required to modify the procedures used by them in the ordinary course of business to back-up and
 5 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
 6 possession, custody, or control.

7 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
 8 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
 9 where that data is created after a disclosure or response is made (unless excluded under Sections
 10 (D)(3) or (E)(1)-(2)).

11 3. Absent a showing of good cause by the requesting party, the following categories
 12 of ESI need not be preserved:

13 a. Deleted, slack, fragmented, or other data only accessible by forensics.

14 b. Random access memory (RAM), temporary files, or other ephemeral data
 15 that are difficult to preserve without disabling the operating system.

16 c. On-line access data such as temporary internet files, history, cache, cookies,
 17 and the like.

18 d. Data in metadata fields that are frequently updated automatically, such as
 19 last-opened dates (see also Section (E)(5)).

20 e. Back-up data that are duplicative of data that are more accessible elsewhere.

21 f. Server, system or network logs.

22 g. Data remaining from systems no longer in use that is unintelligible on the
 23 systems in use.

24 h. Electronic data (e.g., email, calendars, contact data, and notes) sent to or
 25 from mobile devices (e.g., iPhone, iPad, Android devices), provided that a copy of all such
 26 electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop
 27 computer, or “cloud” storage).

28 **E. Privilege**

1 1. A producing party shall create a privilege log of all documents fully withheld from
 2 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
 3 Agreement and Order. Privilege logs shall include a unique identification number for each
 4 document and the basis for the claim (attorney-client privileged or work-product protection). For
 5 ESI, the privilege log may be generated using available metadata, including author/recipient or
 6 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata
 7 provide insufficient information for the purpose of evaluating the privilege claim asserted, the
 8 producing party shall include such additional information as required by the Federal Rules of Civil
 9 Procedure. Privilege logs will be produced to all other parties no later than 30 days after
 10 substantial completion of the producing party's production, unless another deadline is agreed to by
 11 the parties.

12 2. Redactions need not be logged so long as the basis for the redaction is clear on the
 13 redacted document.

14 3. With respect to privileged communications or work-product information generated
 15 after the filing of the complaint in *Sean Colvin, et al. v. Valve Corporation, et al.*, 2:2021-cv-00801
 16 (C.D. Cal.), parties are not required to include any such information in privilege logs..

17 4. Activities undertaken in compliance with the duty to preserve information are
 18 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

19 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
 20 proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding,
 21 constitute a waiver by the producing party of any privilege applicable to those documents,
 22 including the attorney-client privilege, attorney work-product protection, or any other privilege or
 23 protection recognized by law. Information produced in discovery that is protected as privileged or
 24 work product shall be immediately returned to the producing party, and its production shall not
 25 constitute a waiver of such protection.

26 6. If the producing party claims in writing that privileged materials were inadvertently
 27 disclosed, the receiving party, without protest, shall within five business days of such notice return
 28 to counsel for the producing party any and all copies of the inadvertently produced Privileged

1 Material, or in the alternative, within five business days of said notice, the receiving party, without
 2 protest, shall destroy the inadvertently produced privileged material and certify such destruction to
 3 the producing party. Also within five business days, the producing party shall serve a privilege log
 4 identifying such inadvertently produced privilege material, including, to the extent known,
 5 identification of the date of the document, author of the document, the sender of the document, the
 6 recipient of the document, a description of the contents of the document, and the basis for the
 7 privilege claim.

8 7. After the receipt of the privilege log, if the receiving party wishes to contest that
 9 any document or thing alleged to constitute privileged material is protected by the attorney-client
 10 privilege, work product immunity, or any other applicable privilege, the receiving party shall
 11 within five business days so notify the producing party in writing of the identification of the
 12 documents for which it questions the claim of privilege, and the reasons for its assertion that the
 13 documents are not privileged. The producing party must preserve the returned document or thing
 14 until the dispute is resolved.

15 8. Within five business days of the receiving party's notice of intent to challenge the
 16 privilege or protection, the parties will meet and confer in good faith as to the claims of privilege.
 17 If agreement cannot be reached after five business days, any party may thereafter move the Court
 18 for an Order compelling production of any inadvertently produced or disclosed privileged
 19 material. Any such motion may argue that the documents are not privileged, but otherwise shall
 20 not assert the fact of the inadvertent production as grounds for production. The party challenging
 21 the assertion of privilege or production may, however, use the contents of the document in support
 22 of its challenge.

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1 DATED September 30, 2022

2 /s/ Alicia Cobb

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AGREEMENT REGARDING DISCOVERY OF
ELECTRONICALLY STORED INFORMATION AND
[PROPOSED] ORDER CASE No. 2:21-cv-00563-ICC

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1 IT IS SO ORDERED.

2 DATED this ____ day of ____, 2022.

3
4 Hon. John C. Coughenour
United States District Judge

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